REL: May 27, 2022

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0157

L.M.L.

v.

State of Alabama

Appeal from Morgan Circuit Court
(CC-17-1235)

PER CURIAM.

In September 2017, L.M.L. and her husband, M.W.L., were jointly charged in a 19-count indictment for numerous sex offenses against C.J., L.M.L.'s biological daughter and M.W.L.'s stepdaughter, and S.L., L.M.L.'s stepdaughter and M.W.L.'s biological daughter. Specifically,

L.M.L. was charged in Count 4 of the indictment with aiding M.W.L. in the first-degree rape of C.J. by forcible compulsion, see § 13A-6-61(a)(1), Ala. Code 1975; in Count 5 of the indictment with aiding M.W.L. in the first-degree rape of C.J. when C.J. was less than 12 years old, § 13A-6-61(a)(3), Ala. Code 1975; in Count 13 of the indictment with first-degree sodomy of C.J. by forcible compulsion, see § 13A-6-63(a)(1), Ala. Code 1975; in Count 14 of the indictment with first-degree sodomy of C.J. when C.J. was less than 12 years old, see § 13A-6-63(a)(3), Ala. Code 1975; in Count 15 of the indictment with second-degree sodomy of C.J. when C.J. was less than 16 years old and more than 12 years old, see § 13A-6-64(a)(1), Ala. Code 1975; in Count 16 of the indictment with sexual torture of C.J., see § 13A-6-65.1(a)(1), Ala. Code 1975; in Count 17 of the indictment with first-degree sexual abuse of C.J. when C.J. was less than 12 years old, see former § 13A-6-66(a)(3), Ala. Code 1975;[1] in Count 18 of the indictment with first-degree sodomy of S.L. by forcible compulsion,

[1]Effective July 1, 2006, subsection (a)(3) was removed from § 13A-6-66 and § 13A-6-69.1, Ala. Code 1975, was adopted, making the offense of sexually abusing a child less than 12 years old an offense separate from first-degree sexual abuse. The indictment specifically alleged that the sexual abuse of C.J. occurred before July 1, 2006.

see § 13A-6-63(a)(1), Ala. Code 1975; and in Count 19 of the indictment with first-degree sodomy of S.L. when S.L. was less than 12 years old, see § 13A-6-63(a)(3), Ala. Code 1975.

A jury convicted L.M.L. of all 9 charges against her,[2] and the trial court sentenced L.M.L. to 99 years' imprisonment for each of the first-degree-rape, first-degree-sodomy, and sexual-torture convictions, to 20 years' imprisonment for the second-degree-sodomy conviction, and to 10 years' imprisonment for the first-degree-sexual-abuse conviction, the sentences to run consecutively. In addition, the trial court ordered 10 years of post-release supervision, see § 13A-5-6(c), Ala. Code 1975, for the first-degree-rape conviction under Count 5 of the indictment, the first-degree-sodomy conviction under Count 14 of the indictment, and the first-degree-sodomy conviction under Count 19 of the indictment.

The evidence adduced at trial indicated the following. C.J., who was 28 years old at the time of L.M.L.'s trial in September 2020, lived

---

[2]In a separate trial, M.W.L. was convicted of two counts of first-degree rape, one count of second-degree rape, two counts of first-degree sodomy, one count of first-degree sexual abuse, and one count of incest with respect to C.J., and one count of first-degree sexual abuse with respect to S.L. This Court affirmed M.W.L.'s convictions and sentences in an unpublished memorandum. M.W.L. v. State (No. CR-18-0985), 313 So. 3d 35 (Ala. Crim. App. 2019) (table).

with L.M.L. and M.W.L. and her 6 siblings, including her stepsister S.L., for several years when she was a child.[3] C.J. testified that she was born in 1991 and that her stepsister S.L. was "[a]bout two years" younger than her.[4] (R. 100.) C.J. said that L.M.L. and M.W.L. began molesting her and S.L. when C.J. was about 8 or 9 years old and S.L. was about 7 years old, or in either 1999 or 2000. C.J. described incidents of L.M.L. holding her down while M.W.L. engaged in vaginal intercourse with her (giving rise to the first-degree-rape charges in Counts 4 and 5 of the indictment); of L.M.L. forcing C.J. to perform oral sex on L.M.L. (giving rise to the first- and second-degree-sodomy charges in Counts 13, 14, and 15 of the indictment); of L.M.L. penetrating C.J.'s vagina with a foreign object (giving rise to the sexual-torture charge in Count 16 of the indictment); and of L.M.L. penetrating C.J.'s vagina with L.M.L.'s fingers (giving rise to the sexual-abuse charge in Count 17 of the indictment). C.J. also said that she witnessed S.L. performing oral sex on L.M.L. when S.L. was

[3]C.J. testified that, in addition to her stepsister S.L., she had two brothers, one half-sister, and two half-brothers.

[4]Johnny Coker, an investigator with the Morgan County District Attorney's Office, also indicated that C.J. and S.L. were about two years apart in age. He said that, when the complaint was first filed in 2007, C.J. was about 15 years old and S.L. was about 13 years old.

about eight or nine years old.[5] C.J. testified that the rapes and sodomies occurred "[w]ay too many times to count" (R. 97), and that the sexual torture occurred "once or twice a month" from the time she was 12 years old until she was 15 years old and was removed from the home. (R. 95.) C.J. said that if she and S.L. did not comply with what L.M.L. and M.W.L. wanted, they would be punished; that L.M.L. and M.W.L. "were really mean" (R. 106); and that L.M.L. was "a violent person." (R. 107.) According to C.J., she was scared of L.M.L. and M.W.L., and felt like she had no choice but to submit to their sexual demands.

In 2007, when C.J. was 15 years old, she and L.M.L. had a physical altercation that left C.J. with bruises on her face and neck. Officials at C.J.'s school noticed the injuries and contacted the Alabama Department of Human Resources ("DHR"). DHR removed C.J. from L.M.L. and M.W.L.'s home and placed her in the home of M.W.L.'s parents. "[W]orried about [her] sister being left … by herself" with L.M.L. and M.W.L.,[6] C.J. disclosed to M.W.L.'s parents the abuse that had been

---

[5]S.L. did not testify at L.M.L.'s trial.

[6]It is not clear from the record whether C.J. was referring to her stepsister S.L. or to her half-sister.

happening for several years. (R. 82.) M.W.L.'s parents contacted DHR, which removed C.J.'s siblings from L.M.L.'s and M.W.L.'s home.

L.M.L. testified in her own defense. She denied that she had ever inappropriately touched, sexually abused, sodomized, or raped any of her children, and she denied aiding M.W.L. in doing so. According to L.M.L., C.J. fabricated the allegations because C.J. was upset over the events that had prompted their physical altercation, specifically, L.M.L. had punished C.J. for skipping school and having sex with her boyfriend. L.M.L. also said that C.J. was the aggressor in their physical altercation and that she only defended herself against C.J.'s attack. Further, L.M.L. testified that S.L. regularly made false allegations of abuse against her, M.W.L., and S.L.'s biological mother because, she said, S.L. resented having to share a home with her siblings.

In rebuttal, the State presented testimony from B.L., C.J.'s brother, who was 22 years old at the time of the trial. B.L. testified that L.M.L. repeatedly forced him to perform oral sex on her, beginning when he was 6 or 7 years old and continuing until he was removed from the home in 2007, when he was about 9 years old. In surrebuttal, L.M.L. denied B.L.'s

allegation, stating that he had lied because he had always been close with C.J.

I.

L.M.L. first contends on appeal that her convictions and sentences for first-degree rape of C.J. under Counts 4 and 5 of the indictment, first-degree sodomy of C.J. under Counts 13 and 14 of the indictment, and first-degree sodomy of S.L. under Counts 18 and 19 of the indictment violate double-jeopardy principles because, she says, "Counts 4 and 5 charge the same offense alternatively, Counts 13 and 14 charge the same offense alternatively, and Counts 18 and 19 charge the same offense alternatively." (L.M.L.'s brief, p. 12.) She relies primarily on Rudolph v. State, 200 So. 3d 1186 (Ala. Crim. App. 2015), as well as Birdsong v. State, 267 So. 3d 343 (Ala. Crim. App. 2017), and Childs v. State, 238 So. 3d 90 (Ala. Crim. App. 2017), in support of her argument. Although L.M.L. did not raise this issue in the trial court, this type of double-jeopardy issue is jurisdictional and, therefore, may be raised at any time. See Ex parte Robey, 920 So. 2d 1069, 1071-72 (Ala. 2004) (holding that convictions for violating alternative subsections of the same statute "when the actions described in each of those subsections are based on the

same conduct of the accused" violates double-jeopardy principles and "raises questions of the trial court's jurisdiction to enter a judgment").

In Birdsong, this Court held that the defendant's convictions for three counts of first-degree burglary under § 13A-7-5(a)(3), Ala. Code 1975, for a single burglary violated double-jeopardy principles where the three counts in the indictment were identical other than "the crime that [the defendant] intended to commit (i.e., kidnapping or domestic violence) and a slight variation on the clause pertaining to the entry of the victim's dwelling," and "were alternative methods of proving the same offense -- burglary -- and are not three separate and distinct offenses." 267 So. 3d at 351. In Childs, this Court held that the defendant's convictions for two counts of first-degree burglary for a single burglary violated double-jeopardy principles where one count charged that the defendant was armed with a deadly weapon, see § 13A-7-5(a)(3), and one count charged that the defendant caused physical injury, see § 13A-7-5(a)(2), and the defendant's "conduct did not constitute separate offenses." 238 So. 3d at 92. Finally, in Rudolph, this Court held that the defendant's convictions for two counts of first-degree rape for a single rape violated double-jeopardy principles where one count charged rape by forcible compulsion,

see § 13A-6-61(a)(1), and one count charged rape of a child less than 12 years old, see § 13A-6-61(a)(3), both counts arose "out of the same incident," and the defendant's conduct "did not constitute two separate offenses." 200 So. 3d at 1192.

Each of those cases was based on the long-standing premise that "'where there are two different methods of proving the offense charged in one statute, they [do not] constitute separate offenses.'" Birdsong, 267 So. 3d at 350 (quoting Sisson v. State, 528 So. 2d 1159, 1162 (Ala. 1988)). However, each of those cases also involved only a single act or transaction. The threshold inquiry in any double-jeopardy analysis is whether the convictions arise from the same act or transaction. See Birdsong, 267 So. 3d at 448, and Williams v. State, 104 So. 3d 254, 257 (Ala. Crim. App. 2012).

> "The Double Jeopardy Clause does not operate to prohibit prosecution, conviction, and punishment in a single trial for discrete acts of the same offense. See Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991). Thus, whether a defendant's conduct constitutes the same act or transaction 'does not determine whether there is a double jeopardy violation; rather it determines if there could be a violation.' State v. Schoonover, 281 Kan. 453, 467, 133 P.3d 48, 62 (2006)."

Williams, 104 So. 3d at 257 (some emphasis added).

In Counts 4 and 5 of the indictment, L.M.L. was charged with aiding M.W.L. in the first-degree rape of C.J. by forcible compulsion, see § 13A-6-61(a)(1), and aiding M.W.L. in the first-degree rape of C.J. when C.J. was less than 12 years old, see § 13A-6-61(a)(3).[7] At trial, C.J. testified that she was raped by M.W.L., with L.M.L.'s assistance, "[w]ay too many times to count" (R. 97), and she described more than one incident of rape during her testimony. First, C.J. testified:

> "A. The next thing I remember is being ten years old, and it was October 31st because we had a Halloween party.
>
> "....
>
> "A. And after the Halloween party, like, all of the people went home, and my mom and my stepdad were drinking, and I had a video recorder, like a cam recorder.
>
> "....

[7]At the time of the offenses, § 13A-6-61(a)(1) provided that "[a] person commits the crime of rape in the first degree if … [h]e or she engages in sexual intercourse with a member of the opposite sex by forcible compulsion" and § 13A-6-63(a)(3) provided that "[a] person commits the crime of rape in the first degree if … [h]e or she, being 16 years or older, engages in sexual intercourse with a member of the opposite sex who is less than 12 years old." In 2019 the Alabama Legislature amended § 13A-6-61 to, among other things, remove the requirement that the victim be of the opposite sex. Act. No. 2019-465, Ala. Acts 2019. See Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005) ("It is well settled that the law in effect at the time of the commission of the offense controls the prosecution.").

"A. My mom was on her back, and she was making me give her oral sex on her, and I had my butt in the air, and my stepdad was saying that my vagina was really open, and he felt like he could get it in.

"....

"Q. Okay. … And once he said that, what was the next thing that happened? …

"A. He was trying to stick his penis in me, and it was hurting and it was burning --

"….

"A. -- so I was moving. And my mom didn't want my brothers or sisters to wake up and hear me, so she was holding me down, and she put her hand over my mouth so that I couldn't make any noise."

(R. 86-90.) Later, C.J. testified:

"A. … [T]here was, like, a lot of times where she would make me have sex with both of them --

"….

"A. Like, she would make me perform oral sex on her --

"….

"A. -- while [M.W.L.] had sex with me.

"….

"Q. Okay. How many times do you think that that happened, [C.J.]?

"A. Way too many times to count. A lot.

"Q. Okay. Do you know -- did it happen every week?

"A. Every week.

"Q. Okay. And how long was that happening for every week?

"A. At least from the time I was twelve until I was fifteen."

(R. 97-98.)

C.J.'s testimony establishes at least 2 separate offenses of first-degree rape -- one on Halloween when C.J. was 10 years old, leading to the charge in Count 5 of the indictment of first-degree rape when C.J. was less than 12 years old, and the weekly rapes that occurred when C.J. was between 12 and 15 years old, leading to the charge in Count 4 of the indictment of first-degree rape by forcible compulsion. Therefore, because the charges in Counts 4 and 5 of the indictment each arose from a separate act of rape, L.M.L.'s convictions and sentences under both counts do not violate double-jeopardy principles.

In Counts 13 and 14 of the indictment, L.M.L. was charged with first-degree sodomy of C.J. by forcible compulsion, see § 13A-6-63(a)(1), and first-degree sodomy of C.J. when C.J. was less than 12 years old, see

§ 13A-6-63(a)(3).[8] At trial, C.J. testified about multiple instances of sodomy. First, C.J. testified:

> "Q. … What's the next thing you remember?
>
> "A. Being about eight or nine years old and my mom was -- she was -- I think I was like, ten --
>
> "….
>
> "A. -- because my stepdad was at work.
>
> "….
>
> "A. But my mom was in the bedroom and she was watching pornography.
>
> "….
>
> "A. And she made me come in there and perform oral sex on her."

(R. 84-85.) C.J. also testified:

---

[8]At the time of the offenses, see note 7, supra, § 13A-6-63(a)(1) provided that "[a] person commits the crime of sodomy in the first degree if … [h]e engages in deviate sexual intercourse with another person by forcible compulsion" and § 13A-6-63(a)(3) provided that "[a] person commits the crime of sodomy in the first degree if … [h]e, being 16 years old or older, engages in deviate sexual intercourse with a person who is less than 12 years old." In 2019, the Alabama Legislature amended § 13A-6-63 to, among other things, replace the phrase "deviate sexual intercourse" with the word "sodomy." Act. No. 2019-465, Ala. Acts 2019.

"A. I remember periodically throughout the years when my stepdad would be at work, my mom would make me perform oral sex on her --

"....

"Q. Okay. You said that happened 'periodically,' I think was the word you used?

"A. Yeah.

"Q. How often do you think that happened?

"A. I would say, like, from -- at least from the time I was twelve until I was fifteen, like, once or twice a month --

"Q. Okay.

"A. -- if not more."

(R. 94-95.)

C.J.'s testimony establishes at least 2 separate offenses of first-degree sodomy -- one when C.J. was between 8 and 10 years old, leading to the charge in Count 14 of the indictment of first-degree sodomy when C.J. was less than 12 years old, and one of the repeated sodomies that occurred when C.J. was between 12 and 15 years old, leading to the charge in Count 13 of the indictment of first-degree sodomy by forcible compulsion. Therefore, because the charges in Counts 13 and 14 of the indictment each arose from a separate act of sodomy, L.M.L.'s convictions

and sentences under both counts do not violate double-jeopardy principles.

In Counts 18 and 19 of the indictment, L.M.L. was charged with first-degree sodomy of S.L. by forcible compulsion, see § 13A-6-63(a)(1), and first-degree sodomy of S.L. when S.L. was less than 12 years old, see § 13A-6-63(a)(3). At trial, C.J. first testified:

> "Q. ... Specifically, with [S.L.], okay, what did you see with [L.M.L.] and with [S.L.]?
>
> "A. I've seen [S.L.] perform oral sex on [L.M.L.].
>
> "....
>
> "Q. Okay. And do you know how old you guys would have been when you remember that happening?
>
> "A. [S.L.] had to have been eight or nine."

(R. 99.) Later, C.J. testified:

> "Q. Okay. Can you tell us -- what can you tell us about an incident that happened with that camcorder?
>
> "A. There was a time that we were in the living room, my mom and stepdad and my stepsister.
>
> "Q. Your stepsister being [S.L.]?
>
> "A. [S.L.].
>
> "....

"A. And they were watching pornography on the TV.

"….

"A. And they were wanting me and [S.L.] to watch and pay attention, and then my mom was having me put my mouth on her vagina --

"….

"A. -- and my stepdad was videotaping it.

"….

"A. And my stepsister, [S.L.], was there --

"….

"A. -- and they were making my stepsister also give [L.M.L.] oral sex. Like, they were making my stepsister put her mouth on her vagina, too.

"….

"A. And then they played the tape back and, like, they made us watch it --

"….

"Q. Okay. Did that happen just the one time?

"A. No. I would say that happened five or six times.

"Q. Okay. Was [S.L.] there every time that they used the camcorder?

"A. Not every time, no.

"Q. Okay. They used it with just you at some point as well?

"A. Yes.

"Q. Okay. And you said that they made you watch it back that time with [S.L.]?

"A. Yes.

"Q. Did they do that often?

"A. Just like the first few times --

"….

"A. -- but then no."

(R. 104-06.)

The State argues that the incident when C.J. saw S.L. perform oral sex on L.M.L. when S.L. was 8 or 9 years old and the incident in which M.W.L. recorded the sodomy in the living room were separate incidents that authorized 2 separate convictions, while L.M.L. argues "that there is only evidence of one specific occasion." (L.M.L.'s reply brief, p. 3.) C.J.'s testimony certainly suggests that the two incidents were separate and distinct incidents of sodomy, but it is not conclusive in that regard. However, "[a] reviewing court cannot predicate error on matters not

shown by the record." Robinson v. State, 444 So. 2d 884, 885 (Ala. 1983). This is true even with questions involving jurisdiction.

> "'A court of general jurisdiction proceeding within the scope of its powers will be presumed to have jurisdiction to give the judgments and decrees it renders until the contrary appears. So, a court of general jurisdiction is presumed to have acted within its powers, and the burden is on the accused affirmatively to show that it had no jurisdiction, unless facts showing want of jurisdiction affirmatively appear on the record.'
>
> "22 C.J.S. Criminal Law § 174 (1989). '[A] court conducting a criminal proceeding is presumed to have jurisdiction, whether or not there are recitals in its record to show it.' 22A C.J.S. Criminal Law § 702 (1989)."

Willingham v. State, 796 So. 2d 440, 443 (Ala. Crim. App. 2001).

The record in this case contains nothing affirmatively showing a double-jeopardy violation with respect to Counts 18 and 19 of the indictment and, thus, a lack of jurisdiction on the part of the trial court. At most, the record is ambiguous as to whether Counts 18 and 19 were based on the same or separate incidents of sodomy. Therefore, we must presume that the trial court had jurisdiction to convict L.M.L. on both counts, i.e., that her convictions for both counts were based on separate incidents and did not violate double-jeopardy principles.

We note that, in her reply brief, L.M.L. appears to argue that because "the State prosecuted" the offenses in Counts 4, 5, 13, 14, 18, and 19 "by attributing the element of forcible compulsion to each and every one of the events," the State's argument that each offense arose from a separate act or transaction must be rejected. (L.M.L.'s reply brief, p. 5.) However, we know of no authority -- and L.M.L. cites none -- that even remotely suggests that the existence of forcible compulsion prohibits multiple convictions for separate and distinct instances of rape or sodomy nor do we know of any authority that prohibits the State from prosecuting a person for first-degree rape and first-degree sodomy based on the age of the victim when there is also evidence of forcible compulsion. L.M.L.'s argument in this regard is meritless.

II.

L.M.L. also contends on appeal that the evidence was insufficient to sustain her conviction for first-degree sodomy of S.L. under Count 18 of the indictment.[9]

[9]L.M.L. moved for a judgment of acquittal at the close of the State's case and at the close of the defense's case. She also filed a motion for a new trial challenging the sufficiency of the State's evidence. Therefore, this issue was properly preserved for review.

> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985). '"The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt."' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). '"When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision."' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978)."

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003).

In Higdon v. State, 197 So. 3d 1019 (Ala. 2015), the Alabama Supreme Court explained:

> "To establish a prima facie case of first-degree rape or first-degree sodomy, thus allowing the matter to be submitted to the jury, the State must present evidence indicating that the defendant engaged in sexual intercourse by forcible compulsion, i.e., that the defendant engaged in sexual intercourse under circumstances in which the victim earnestly resisted the sexual act or was threatened into the

> sexual act. § 13A-6-61 and § 13A-6-63, Ala. Code 1975. 'Forcible compulsion' is defined as '[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person.' § 13A-6-60(8).[10]
>
> "In Powe v. State, 597 So. 2d 721 (Ala. 1991), this Court examined whether the State had presented sufficient evidence to sustain the defendant's conviction for first-degree rape by forcible compulsion. In Powe, the 40-year-old natural father had assaulted his 11-year-old daughter in his bedroom while no one else was home. The daughter testified that she was afraid of her father. No evidence, however, was presented indicating that the daughter had been overcome by physical force exerted by the father or that the father had expressly threatened the daughter. This Court, however, reasoned that a child's general fear of a parent can suffice as the 'force' necessary to support a rape conviction; this Court, therefore, affirmed the conviction, concluding that the totality of the evidence was sufficient to establish an implied threat that placed the daughter 'in fear of immediate death or serious physical injury.' § 13A-6-60(8). We stated:
>
> > "'[A] jury could reasonably infer that [the father] held a position of authority and domination with regard to his daughter sufficient to allow the inference of an implied threat to her if she refused to comply with his demands.'
>
> "597 So. 2d at 728. We observed that the decision

[10]This definition of forcible compulsion was in effect at the time of the offenses in this case. In 2019, the Alabama Legislature amended § 13A-6-60 to, among other things, redefine forcible compulsion. Ala Act. No. 2019-465, Ala. Acts 2019.

> "'establishe[d] a mechanism by which the unique relationship between children and the adults who exercise a position of dominion and control over them may be taken into consideration in determining whether the element of forcible compulsion has been established.'

"597 So. 2d at 729.

> "….
>
> "… [T]he focus in determining whether sufficient evidence has been presented from which a jury can infer that forcible compulsion by an implied threat exists should be the perspective of the child victim. As this Court recognized in Powe:
>
> > "'When a defendant who plays an authoritative role in a child's world instructs the child to submit to certain acts, an implied threat of some sort of disciplinary action accompanies the instruction. If the victim is young, inexperienced, and perhaps ignorant of the "wrongness" of the conduct, the child may submit to acts because the child assumes that the conduct is acceptable or because the child does not have the capacity to refuse.'
>
> "597 So. 2d at 728-29 (emphasis added). Thus ... when determining as a matter of law the sufficiency of the evidence of an implied threat from which a jury may infer the element of forcible compulsion, the trial court may consider from the child victim's perspective, among other factors, the difference in age or physical maturity between the defendant and the child victim and the defendant's conduct and exercise of a position of authority or control over the child victim."

197 So. 3d at 1021-22.

As noted in Part I of this opinion, C.J. testified she had seen S.L. perform oral sex on L.M.L. and she testified about an incident in the living room when M.W.L. recorded her and S.L. performing oral sex on L.M.L. When describing the incident that was recorded, C.J. specifically said that "they were making my stepsister also give [L.M.L.] oral sex. Like, they were making my stepsister put her mouth on her vagina, too." (R. 105.) In addition, C.J. testified:

> "Q. Okay. I know that you've said throughout this whole time, [C.J.], that they were making you do something?
>
> "A. Yeah.
>
> "Q. Did you want to do any of these things?
>
> "A. No.
>
> "Q. Okay. When you said they were making you, can you kind of explain what you mean by they made you?
>
> "A. Like, if we didn't, we would get punished.
>
> "Q. Okay. Did they tell you you were going to get punished? Is that something they said?
>
> "A. No, but they were really mean.
>
> "Q. They were really mean?
>
> "A. Yeah, they were just mean.
>
> "Q. Okay. Were you scared of them?

"A. Yes.

"Q. With [L.M.L.] in particular, why were you scared of [L.M.L.]?

"A. She was just a violent person.

"Q. She was a violent person?

"A. (Witness nods head.)

"Q. Okay. Had you been in trouble and she punished you physically or violently before?

"A. Yes.

"Q. Okay. Did they threaten you at any point, either one of them?

"A. Like, what do you mean?

"Q. Did they use any words? Did they tell you what was going to happen if you didn't do something they wanted you to?

"A. I mean, I just always did, like, what they said.

"Q. Okay. They're your parents; right?

"A. Yeah.

"Q. Okay. So you felt like you had to do what they were going to say or you were going to get in trouble?

"A. Yeah."

(R. 106-07.)

L.M.L. argues that, with respect to S.L., "[t]here was no evidence of forcible compulsion or earnest resistance to such force; nor was there evidence of any implied or express threat of imminent death or serious physical injury." (L.M.L.'s brief, p. 22.) In her reply brief, L.M.L. notes that S.L. did not testify at trial and she cites Ex parte Dobyne, 805 So. 2d 763, 773 (Ala. 2001), for the proposition that "inferences can be drawn only from facts established by the evidence and … an inference cannot be based on another inference." (L.M.L.'s reply brief, p. 10.) She argues that, although C.J. testified that she was afraid of being punished if she did not submit to L.M.L.'s sexual demands, thus raising the inference of forcible compulsion against C.J., "there is no evidence to the effect that S.L. also had these same perceptions" (L.M.L.'s reply brief, p. 9.) and "there is no direct evidence" of forcible compulsion against S.L. (L.M.L.'s brief, p. 11.) Thus, L.M.L. concludes, any inference of forcible compulsion against S.L. is based, not on evidence, but on the inference of forcible compulsion against C.J. We disagree.

C.J.'s testimony established the following facts: L.M.L. was a parent who played an authoritative role in both C.J.'s and S.L.'s lives; if C.J. and S.L. did not submit to L.M.L.'s sexual demands, they would be

punished; M.W.L. and L.M.L. were mean and L.M.L. was violent; C.J. was afraid of L.M.L. and felt compelled to submit to L.M.L. to avoid punishment and because L.M.L. was her parent; on at least one occasion, M.W.L. and L.M.L. "were making" S.L. perform oral sex on her; and S.L. was about two years younger than C.J. Considering the totality of the circumstances, it can reasonably be inferred from the evidence presented at trial (not from another inference) that there was an implied threat from L.M.L., a parental figure, against S.L., her stepdaughter who was even younger than C.J., sufficient to support the element of forcible compulsion. See, e.g., Black v. State, 295 So. 3d 1120, 1133 (Ala. Crim. App. 2019) ("[W]here an adult charged with the sexual assault of a child is in 'a position of authority and domination,' Powe, 597 So. 2d at 728, over the child, a jury may conclude, based upon the totality of the circumstances, that the sexual assault carried an implied threat sufficient to establish the element of forcible compulsion."); and R.E.N. v. State, 944 So. 2d 981 (Ala. Crim. App. 2006) (holding that there was sufficient evidence of forcible compulsion when the defendant sexually assaulted his daughter even though there was no evidence of earnest resistance by the daughter or of an express threat by the defendant).

Therefore, the evidence was sufficient to sustain L.M.L.'s conviction for first-degree sodomy of S.L. by forcible compulsion under Count 18 of the indictment.

III.

L.M.L. further contends that her sentences for her convictions under Counts 5 and 14 of the indictment for first-degree rape and first-degree sodomy of C.J. when C.J. was less than 12 years old were illegal because they included 10 years of post-release supervision under § 13A-5-6(c), Ala. Code 1975, which, she says, was not in effect at the time the offenses were committed. She also contends that her sentence for her conviction under Count 19 of the indictment for first-degree sodomy of S.L. when S.L. was less than 12 years old may be illegal because it, too, included 10 years of post-release supervision pursuant to § 13A-5-6(c), and, according to L.M.L., the record is ambiguous as to whether that offense was committed before or after § 13A-5-6(c) was enacted and effective. L.M.L. requests that we remand this cause for the trial court to resentence her for her convictions under Counts 5 and 14 and to determine when the offense in Count 19 of the indictment occurred. The State agrees that L.M.L.'s sentences for her convictions under Counts 5

and 14 of the indictment are illegal and also requests that we remand this cause for the trial court to determine when the offense in Count 19 occurred. Although L.M.L. did not raise this issue in the trial court, "[m]atters concerning unauthorized sentences are jurisdictional." Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994).

C.J. testified that she was born in 1991, and as explained previously in this opinion, she described during her testimony a specific incident of rape that occurred when she was 10 years old, which would have been 2001, and a specific incident of sodomy that occurred when she was between 8 and 10 years old, which would have been between 1999 and 2001. C.J. also testified that S.L. was about 2 years younger than her and an investigator with the district attorney's office confirmed that C.J. and S.L. were about 2 years apart in age, stating that when the complaint was first filed in 2007, C.J. was about 15 years old and S.L. was about 13 years old. This testimony indicates that S.L. was born in either 1993 or 1994. C.J. said that she saw S.L. perform oral sex on L.M.L. when S.L. was 8 or 9 years old, which would have been between 2001 and 2003. In addition, we note that the record includes a "Transcript of Record Conviction Report" that was certified by the circuit court clerk as

containing "true and correct" information "extracted from official court records" and it indicates that C.J. was born in October 1991 and that S.L. was born in April 1993. (C. 83.) Thus, the record is clear that the offenses in Counts 5, 14, and 19 of the indictment occurred sometime between 1999 and 2003.

Section 13A-5-6(c) provides:

> "In addition to any penalties heretofore or hereafter provided by law, in all cases where an offender is designated as a sexually violent predator pursuant to Section 15-20A-19, or where an offender is convicted of a Class A felony sex offense involving a child as defined in Section 15-20A-4, and is sentenced to a county jail or the Alabama Department of Corrections, the sentencing judge shall impose an additional penalty of not less than 10 years of post-release supervision to be served upon the defendant's release from incarceration."

That section became effective October 1, 2005, see Act. No. 2005-301, Ala. Acts 2005, after the offenses in Counts 5, 14, and 19 were committed. This Court has held that § 13A-5-6(c) does not apply to crimes committed before its effective date. See Garner v. State, 977 So. 2d 533, 539 (Ala. Crim. App. 2007) ("Because § 13A-5-6(c), Ala. Code 1975, was not in effect at the time the appellant committed the offense in this case, the trial court erroneously imposed the ten-year period of post-release supervision provided for in that section."). See also S.R.A. v. State, 292 So. 3d 1108,

1113 (Ala. Crim. App. 2019), in which a plurality of this Court held similarly.

> "'As a general rule, a criminal offender must be sentenced pursuant to the statute in effect at the time of the commission of the offense, at least in the absence of an expression of intent by the legislature to make the new statute applicable to previously committed crimes. An increase in the penalty for previously committed crimes violates the prohibition against ex post facto legislation."

Zimmerman v. State, 838 So. 2d 404, 405 (Ala. Crim. App. 2001) (quoting 24 C.J.S. Criminal Law § 1462 (1989) (footnotes omitted)). At the time L.M.L. committed the crimes alleged in Counts 5, 14, and 19 of the indictment, those crimes were punishable by not less than 10 years' imprisonment and not more than life or 99 years' imprisonment. § 13A-5-6(a)(1), Ala. Code 1975. At the time L.M.L. was sentenced, however, those crimes were punishable by not less than 20 years' imprisonment, § 13A-5-6(a)(5), Ala. Code 1975, nor more than life or 99 years' imprisonment, § 13A-5-6(a)(1), Ala. Code 1975, plus a period of post-release supervision of not less than 10 years, § 13A-5-6(c). Because § 13A-5-6(c) increased the sentence for a Class A felony sex offense involving a child by adding a period of post-release supervision, interpreting it to apply retroactively would result in an ex post facto law.

"'"'It is the duty of the court to construe a statute so as to make it harmonize with the constitution if this can be done without doing violence to the terms of the statute and the ordinary canons of construction.'"'" Magee v. Boyd, 175 So. 3d 79, 107 (Ala. 2015) (quoting Ex parte Jenkins, 723 So. 2d 649, 658 (Ala. 1998) (quoting in turn Board of Educ. of Choctaw Cnty. v. Kennedy, 256 Ala. 478, 482, 55 So. 2d 511, 514 (1951), quoting in turn Almon v. Morgan Cnty., 245 Ala. 241, 246, 16 So. 2d 511, 516 (1944)). "We are ... obligated to construe statutes in a manner that avoids a holding that a statute may be unconstitutional." State v. Giorgetti, 868 So. 2d 512, 518 (Fla. 2004).

The special writing dissenting from Part III takes the position that this Court may construe § 13A-5-6(c) to apply retroactively without violating the prohibition on ex post facto legislation because, it reasons, post-release supervision is referenced in the Alabama Sex Offender Registration and Community Notification Act ("ASORCNA"), § 15-20A-1 et seq., Ala. Code 1975, which is a civil regulatory scheme and which, by virtue of § 15-20A-3(a), Ala. Code 1975, applies retroactively to all convicted sex offenders regardless of when their crimes were committed.

Specifically, the dissent points to § 15-20A-20(d), Ala. Code 1975, which provides:

> "Any person convicted of a Class A felony sex offense involving a child as defined in Section 15-20A-4, upon release from incarceration, shall be subject to electronic monitoring supervised by the Board of Pardons and Paroles, as provided in subsection (a), for a period of no less than 10 years from the date of the sex offender's release. This requirement shall be imposed by the sentencing court as a part of the sex offender's sentence in accordance with subsection (c) of Section 13A-5-6."

In Bishop v. State, [Ms. CR-19-0726, July 9, 2021] ___ So. 3d ___ (Ala. Crim. App. 2021), this Court recognized that the post-release supervision referred to in § 13A-5-6(c) is in the nature of probation and that § 15-20A-20(d) sets out the manner in which that post-release supervision must be served. However, the fact that ASORCNA sets out the manner in which post-release supervision must be served does not answer the question whether retroactive application of § 13A-5-6(c) is constitutionally permissible. Rather,

> "[w]e must 'ascertain whether the legislature meant the statute to establish "civil" proceedings.' Kansas v. Hendricks, 521 U.S. 346, 361 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is '"so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil."' Ibid. (quoting United States v. Ward, 448 U.S. 242, 248–249,

> 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). Because we 'ordinarily defer to the legislature's stated intent,' Hendricks, supra, at 361, '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' Hudson v. United States, 522 U.S. 93, 100 (1997) (quoting Ward, supra, at 249); see also Hendricks, supra, at 361; United States v. Ursery, 518 U.S. 267, 290 (1996); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984).
>
> "....
>
> "Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' Hendricks, supra, at 361 (internal quotation marks omitted); see also Hudson, supra, at 99. We consider the statute's text and its structure to determine the legislative objective. Flemming v. Nestor, 363 U.S. 603, 617 (1960). A conclusion that the legislature intended to punish would satisfy an ex post facto challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it."

Smith v. Doe, 538 U.S. 84, 92-93 (2003).

We need not inquire into the effects of § 13A-5-6(c) because the plain language of § 13A-5-6(c) and § 15-20A-20(d) establish that the legislature intended post-release supervision to be punishment. The legislature stated that post-release supervision for Class A felony sex offenses involving a child is a penalty, § 13A-5-6(c), that must be imposed by the sentencing court as part of the sex offender's sentence, § 15-20A-20(d). Although there is no question that the legislature generally intended

ASORCNA to be a civil regulatory scheme designed to protect the public, not to punish sex offenders, the legislature clearly and unequivocally expressed a contrary intent in § 15-20A-20(d) with respect to post-release supervision.

The dissent relies heavily on Belleau v. Wall, 811 F.3d 929 (7th Cir. 2016), for the proposition that retroactive application of § 13A-5-6(c) is not an ex post facto violation. Belleau, however, involved the electronic monitoring of sex offenders who had been civilly committed. In Belleau, the plaintiff was scheduled to be released from prison at the expiration of his criminal sentence for a sex crime, but, instead, he was involuntarily committed to a treatment center after having been found in a civil commitment proceeding to suffer a mental disorder that made him sexually violent and likely to reoffend. During his commitment, the Wisconsin legislature enacted a statute that required all sex offenders released from civil commitment to wear a global-positioning-system ("GPS") device for the remainder of their lives; the legislature expressly stated that the statute applied to any sex offender released from civil commitment after January 2008. The plaintiff was released from his civil commitment in 2010 and was forced to wear a GPS-enabled ankle

monitor. He filed suit, arguing, among other things, that the newly enacted statute was an ex post facto law. The United States Court of Appeals for the Seventh Circuit rejected the argument because civil commitment of sex offenders is not considered punishment under the United States Constitution. The Court explained:

> "A statute is an ex post facto law only if it imposes punishment. Smith v. Doe, supra, 538 U.S. [84,] 92–96, 123 S.Ct. 1140 [(2003)]. The monitoring law is not punishment; it is prevention. See, e.g., id. at 97–106, 123 S.Ct. 1140; Mueller v. Raemisch, 740 F.3d 1128, 1133–35 (7th Cir. 2014); Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007); cf. Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003); City of Indianapolis v. Edmond, 531 U.S. 32, 44–46, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990); Skinner v. Railway Labor Executives' Ass'n, supra, 489 U.S. [602,] 620–21, 630, 109 S.Ct. 1402 [(1989)]. The plaintiff does not quarrel with his civil commitment; even though it took away his freedom and was in most respects indistinguishable from confining him in prison, it was not ex post facto punishment because the aim was not to enhance the sentences for his crimes but to prevent him from continuing to molest children. In Kansas v. Hendricks, 521 U.S. 346, 368–69, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the Supreme Court held that civil commitment of sex offenders who have completed their prison sentences but are believed to have a psychiatric compulsion to repeat such offenses is not punishment as understood in the Constitution; it is prevention. The aim of the anklet monitor statute is the same, and the difference between having to wear the monitor and being civilly committed is that the former measure is less likely to be perceived as punishment than is being imprisoned in an asylum for the criminally insane. So if civil commitment

> is not punishment, as the Supreme Court has ruled, then a fortiori neither is having to wear an anklet monitor. It is not 'excessive with respect to [the nonpunitive] purpose,' Smith v. Doe, supra, 538 U.S. at 97, 123 S.Ct. 1140, for Wisconsin to conclude that all formerly committed sex offenders pose too great a risk to the public to be released without monitoring."

Belleau, 811 F. 3d at 937.

We find Riley v. New Jersey State Parole Board, 98 A. 3d 544, 219 N.J. 270 (2014), to be more persuasive because it involved, similar to 13A-5-6(c), the addition of a period of post-release electronic monitoring for certain convicted sex offenders after their release from prison. In Riley, the defendant was convicted of a sex crime in 1986 and was sentenced to prison. At the time he committed the crime, New Jersey law did not provide for any form of post-release supervision as part of his criminal sentence. While the defendant was serving his sentence, however, the New Jersey Legislature enacted the Sex Offender Monitoring Act ("SOMA") which required the defendant to wear a GPS-enabled ankle monitor after his release from prison for the rest of his life. After his release from prison, he challenged SOMA, arguing that it was an ex post facto law that retroactively increased his sentence for a crime committed before SOMA was enacted. The New Jersey Supreme Court agreed, holding that, even though the legislature intended to enact a civil

regulatory scheme, SOMA was "essentially a parole supervision for life by another name" and, therefore, was punitive and violated the Ex Post Facto Clause of both the United States and New Jersey Constitutions as applied to defendants whose crimes were committed before its enactment. Riley, 98 A.3d at 547, 219 N.J. at 275. The Court, in a thorough and well reasoned opinion, explained:

> "The Ex Post Facto Clause proscribes '[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.' Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648, 650 (1798). Stated slightly differently, 'any statute ... which makes more burdensome the punishment for a crime, after its commission, ... is prohibited as ex post facto.' Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68, 70 L.Ed. 216, 217 (1925). These formulations, which are 'faithful to our best knowledge of the original understanding of the Ex Post Facto Clause,' simply bar a legislature from 'retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts.' Collins v. Youngblood, 497 U.S. 37, 43, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30, 39 (1990).
>
> "....
>
> "Two findings must be made for a law to violate the ex post facto prohibition. A court must first determine that the law is 'retrospective.' Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351, 360 (1987) (citation and internal quotation marks omitted). A law is retrospective if it '"appl[ies] to events occurring before its enactment"' or 'if it "changes the legal consequences of acts completed before its effective date."' Ibid. (quoting Weaver[v. Graham], supra, 450 U.S. [24,] 29, 31, 101 S.Ct. [960,] 964, 965, 67 L.Ed.2d

[17,] 24 [(1981)]). Second, the court must determine whether the law, as retrospectively applied, imposes additional punishment to an already completed crime. Kansas v. Hendricks, 521 U.S. 346, 370, 117 S.Ct. 2072, 2086, 138 L.Ed.2d 501, 520 (1997) (citation omitted).

"Assuming that a statute is intended to apply retroactively, determining whether the statute imposes punishment requires a two-part evaluation under the Ex Post Facto Clause. Smith[v. Doe], supra, 538 U.S. [84,] 92, 123 S.Ct. [1140,] 1146–47, 155 L.Ed.2d [164,] 176 [(2003)]. First, a court must assess whether the Legislature intended 'to impose punishment.' Id. at 92, 123 S.Ct. at 1147, 155 L.Ed.2d at 176. If the court finds that the Legislature had a punitive intent, 'that ends the inquiry.' Ibid.

"However, even if the Legislature's 'intention was to enact a regulatory scheme that is civil and nonpunitive, [the court] must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil.' Ibid. (alteration, citation, and internal quotation marks omitted). To determine the 'effects' of a statute for ex post facto purposes, the United States Supreme Court found 'as a useful framework' seven factors referred to in [Kennedy v.] Mendoza–Martinez, [372 U.S. 144 (1963),] a case involving a double jeopardy challenge. Id. at 97, 123 S.Ct. at 1149, 155 L.Ed.2d at 179.

"The Supreme Court in Smith focused on the five Mendoza–Martinez factors 'most relevant' to its analysis of whether the 'effects' of the Alaska Sex Offender Registration Act imposed a retroactive punishment violative of the Ex Post Facto Clause. Id. at 97, 123 S.Ct. at 1149, 155 L.Ed.2d at 180.5 The Supreme Court looked to whether the sex-offender registry scheme 'in its necessary operation' (1) 'has been regarded in our history and traditions as a punishment'; (2) 'imposes an affirmative disability or restraint'; (3) 'promotes the traditional aims of punishment'; (4) 'has a rational

connection to a nonpunitive purpose'; or (5) 'is excessive with respect to this purpose.' Ibid. These factors are considered 'useful guideposts' and not an 'exhaustive [or] dispositive' list. Id. at 97, 123 S.Ct. at 1149, 155 L.Ed.2d at 179–80 (citations and internal quotation marks omitted). Each factor does not necessarily receive the same weight.

"Applying those factors in Smith, the Court upheld Alaska's sex offender registration and notification statute against an ex post facto challenge, finding that it was a civil regulatory scheme with nonpunitive effects. The Court concluded that the statute did not impose physical restraints on sex offenders, left them free to 'change jobs [and] residences,' and 'to move where they wish and to live and work as other citizens, with no supervision.' Id. at 100–01, 123 S.Ct. at 1151–52, 155 L.Ed.2d at 181–82 (emphasis added). The Court observed that the registration and notification law imposed obligations 'less harsh than the sanctions of occupational debarment, which [the Court has] held to be nonpunitive.' Id. at 100, 123 S.Ct. at 1151, 155 L.Ed.2d at 181.

"In an earlier case, the Supreme Court determined that the retroactive application of a Kansas statute allowing for the civil commitment of sexually violent predators did not violate the Ex Post Facto Clause. Hendricks, supra, 521 U.S. at 371, 117 S.Ct. at 2086, 138 L.Ed.2d at 520–21. Under the Kansas statute, commitment of a convicted offender occurs only if the State shows that he 'suffers from a mental abnormality or personality disorder which makes [him] likely to engage in the predatory acts of sexual violence.' Id. at 357, 117 S.Ct. at 2080, 138 L.Ed.2d at 512 (citation and internal quotation marks omitted). Commitment is permitted, regardless of the date of the predicate offense, based on a court's determination of current dangerousness to the public. Id. at 371, 117 S.Ct. at 2086, 138 L.Ed.2d at 520. Significantly, however, a person cannot be 'confined any longer than he suffers from a mental abnormality rendering

him unable to control his dangerousness,' and he is entitled to yearly reviews at which the State bears the burden of justifying continued commitment. Id. at 364, 117 S.Ct. at 2083, 138 L.Ed.2d at 516. The Court in Hendricks found that the statute did not constitute 'punishment' under the Ex Post Facto Clause, in part because the sexually violent predator law was comparable to traditional involuntary civil commitment of those suffering from a mental illness. Id. at 369–71, 117 S.Ct. at 2086, 138 L.Ed.2d at 520. According to the Court, 'historically,' such 'nonpunitive detention' of the dangerous mentally ill has not been considered to be punishment. Id. at 363, 117 S.Ct. at 2083, 138 L.Ed.2d at 516.

"In contrast to the statutes in Smith and Hendricks that are denominated as nonpunitive and civil in nature, parole and probation have historically been viewed as punishment. See Griffin v. Wisconsin, 483 U.S. 868, 874, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709, 717 (1987) ('Probation, like incarceration, is "a form of criminal sanction imposed by a court upon an offender ...."' (quoting George G. Killinger et al., Probation and Parole in the Criminal Justice System 14 (1976))); United States v. Dozier, 119 F.3d 239, 242 (3d Cir. 1997) ('Supervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act.'); State v. Bowditch, 364 N.C. 335, 700 S.E.2d 1, 8 (2010) ('An offender's period of parole or probation, and its attendant State supervision, historically have been considered a form of criminal punishment.'). That parole is 'in legal effect imprisonment' is well established. See Anderson v. Corall, 263 U.S. 193, 196, 44 S.Ct. 43, 44, 68 L.Ed. 247, 254 (1923) (stating that although parole is 'an amelioration of punishment, it is in legal effect imprisonment'); see also United States ex rel. Nicholson v. Dillard, 102 F.2d 94, 96 (4th Cir. 1939) (stating that parole is 'imprisonment in legal effect').

"Significantly, the Court in Smith, supra, differentiated between Alaska's sex-offender registry scheme and probation

and supervised release. 538 U.S. at 101, 123 S.Ct. at 1152, 155 L.Ed.2d at 182. The Court noted that, unlike the registration and notification law, probation or supervised release curtailed an individual's right 'to live and work as other citizens' without supervision and imposed 'a series of mandatory conditions [that] allow the supervising officer to seek the revocation of probation or release in case of infraction.' Ibid.

"Community supervision for life and its corollary parole supervision for life are merely indefinite forms of parole. We have ruled that community supervision for life 'is punitive rather than remedial.' [State v.] Schubert, supra, 212 N.J. [295,] 308, 53 A.3d 1210[, 1217 (2012)]. We came to that conclusion despite the fact that 'one of the purposes of community supervision for life is to protect the public from recidivism by defendants convicted of serious sexual offenses.' Id. at 307–08, 53 A.3d 1210 (citation and internal quotation marks omitted). As we noted in Schubert, 'one of the purposes of incarceration' is public safety, id. at 308, 53 A.3d 1210, yet no one would seriously argue that -- outside of civil-commitment detention -- imprisonment is nonpunitive because of the remedial benefits of deterrence and safety to the public.

"….

"Courts in other jurisdictions have addressed whether GPS monitoring of sex offenders constitutes punishment for ex post facto purposes, with varying results. In [Commonwealth v.] Cory, supra, [911 N.E.2d 187, 454 Mass. 559 (2009),] the Massachusetts Supreme Judicial Court declared that a law requiring the mandatory GPS monitoring of sex offenders already on probation was 'punitive in effect' and therefore violated the Ex Post Facto Clause. 911 N.E.2d at 197. The court weighed the Mendoza–Martinez factors in reaching that outcome. Id. [911 N.E.2d] at 195–97. The court found that '[t]he GPS device burden[ed] liberty ... by its

permanent, physical attachment' and 'its continuous surveillance,' and found that the device was 'dramatically more intrusive and burdensome' than a yearly registration requirement. Id. [911 N.E.2d] at 196. The court observed that in 'no context other than punishment' does the state physically attach -- for a period of years under threat of imprisonment -- a device 'without consent and also without consideration of individual circumstances.' Id. [911 N.E.2d] at 196. The attachment of a GPS monitoring device, according to the court, 'is a serious, affirmative restraint.' Ibid.

"In contrast to Cory, in Doe v. Bredesen, [507 F.3d 998 (6th Cir. 2007),] the United States Court of Appeals for the Sixth Circuit upheld, against an ex post facto challenge, the Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, which 'authorized the Tennessee Board of Probation and Parole ... to subject a convicted sexual offender to a satellite-based monitoring program for the duration of his probation.' 507 F.3d 998, 1000 (6th Cir. 2007) (emphasis added).

"Importantly, unlike the defendants in Cory and Bredesen, Riley had completed the entirety of his sentence and was under no form of supervised release at the time the State subjected him to a regime of GPS monitoring. In Cory and Bredesen, GPS monitoring became an additional condition to an ongoing probation. We do not suggest that GPS monitoring may not be added as a condition of parole supervision that is ongoing -- that is, while the offender is still serving his sentence.

"[State v.] Bowditch, supra, 364 N.C. 335, 700 S.E.2d 1 [(2010)], is clearly at odds with Cory and the Appellate Division majority in this case. There, the North Carolina Supreme Court upheld against an ex post facto challenge a statute that provided for GPS monitoring of sexual offenders, regardless of whether the offenders had completed their sentences. Id. [700 S.E.2d] at 3. The majority ruled that the

statute as a whole was 'enacted with the intent to create a civil regulatory scheme' and did not violate the Ex Post Facto Clause. Id. [700 S.E.2d] at 13. A three-person dissent sharply disagreed with the majority, finding that '[t]he physical and practical realities of the [GPS monitoring] program ... transform the effect of the scheme from regulatory to punitive.' Id. [700 S.E.2d] at 21 (Hudson, J., dissenting).

"....

"The issue is whether, despite the remedial intent of the Legislature, SOMA's adverse effects are 'so punitive either in purpose or effect as to negate the State's intent to deem it only civil and regulatory.' Smith, supra, 538 U.S. at 92, 123 S.Ct. at 1147, 155 L.Ed.2d at 176 (alteration, citation, and internal quotation marks omitted). In other words, if the real world effects of the twenty-four-hour GPS monitoring regime on Riley's life are unmistakably punitive in nature, the Ex Post Facto Clause will bar retroactive application of SOMA. This 'adverse effects' analysis requires us to turn to the five Mendoza–Martinez factors considered most relevant by the Supreme Court in Smith.

"....

"The first two of the Mendoza–Martinez factors identified in Smith weigh most heavily in our analysis. The first factor is whether 'the regulatory scheme[] has been regarded in our history and traditions as a punishment.' Id. at 97, 123 S.Ct. at 1149, 155 L.Ed.2d at 180. The technology that has given rise to SOMA is of relatively recent origin. There are no direct historical analogues to a twenty-four-hour-a-day electronic surveillance that can track an individual's every movement. Nevertheless, the closest analogue to SOMA is parole and, more particularly, parole supervision for life.

"Riley, now eighty-one years old, having fully completed his criminal sentence, is under the Parole Board's supervision and subject to regulations it has adopted. He has been assigned a monitoring parole officer. He must notify his parole officer of any change in residence; of any change in employment, including work hours and schedule; of plans to travel outside of the State; and of GPS equipment that is inoperable, lost, or damaged. He must permit his parole officer to enter his home to perform equipment maintenance and 'to investigate a report of non-compliance with a condition of the monitoring program.' The parole officer must be able to monitor Riley twenty-four hours a day, and to determine when he is moving, at what speed, and in what direction. Riley must always be available to respond to messages sent to him through his GPS tracking device. That requires Riley to have his GPS device charged at all times -- two hours after every sixteen hours of use. He also is responsible for the cost of its repair. Riley cannot travel anywhere his GPS device does not operate or where it cannot be charged within a sixteen-hour period. The failure to comply with any those conditions constitutes a third-degree crime punishable by up to five years in prison. N.J.S.A. 30:4–123.94.

"This scheme, unlike the reporting and notification requirements of Megan's Law, is similar to a form of supervised release with mandatory conditions that allows a supervising officer -- such as a parole officer -- to seek revocation of the release for a violation. Cf. Smith, supra, 538 U.S. at 101, 123 S.Ct. at 1152, 155 L.Ed.2d at 182. SOMA looks like parole, monitors like parole, restricts like parole, serves the general purpose of parole, and is run by the Parole Board. Calling this scheme by another name does not alter its essential nature.

"….

"SOMA, moreover, 'imposes an affirmative disability or restraint' -- the second most important Mendoza–Martinez

factor in our analysis. See Smith, supra, 538 U.S. at 97, 123 S.Ct. at 1149, 155 L.Ed.2d at 180. That is evident from our discussion that SOMA imposes a regime similar to parole. If the 'affirmative disability or restraint' imposed by a law 'is minor and indirect, its effects are unlikely to be punitive.' Id. at 99–100, 123 S.Ct. at 1151, 155 L.Ed.2d at 181 (citation and internal quotation marks omitted). On the other end of the spectrum, if 'the affirmative disability or restraint' is direct and extreme, then the statute's effects are more likely to be punitive.

"....

"The remaining Mendoza–Martinez factors discussed in Smith do not alter the ineluctable conclusion that the 'effects' of the continuous GPS global monitoring scheme are punitive in nature. Whether SOMA 'promotes the traditional aims of punishment' or has a 'rational connection to a nonpunitive purpose,' Id. at 97, 123 S.Ct. at 1149, 155 L.Ed.2d at 180, are not decisive factors here. To the extent that SOMA resembles parole, it necessarily embodies aims commonly associated with punishment, including deterrence. On the other hand, '[a]ny number of governmental programs might deter crime without imposing punishment.' Id. at 102, 123 S.Ct. at 1152, 155 L.Ed.2d at 183. Rehabilitation too is a factor both in fashioning a criminal sentence and in certain civil regulatory schemes, such as the Sexually Violent Predator Act. It is difficult to see what rehabilitative benefits SOMA might offer Riley.

"Public safety is a prime consideration in the imposition of a criminal sentence, Schubert, supra, 212 N.J. at 307–08, 53 A.3d 1210 yet public safety is also a driving force for such nonpunitive civil statutes as Megan's Law and the Sexually Violent Predator Act. All in all, these factors are inconclusive in determining whether the statute is punitive or civil in nature. Id. at 307, 53 A.3d 1210 (noting that statute will not be classified as 'remedial rather than punitive because the

> purpose of the statute is to protect members of the community').
>
> "Last, whether SOMA 'is excessive with respect to [its nonpunitive] purpose,' Smith, supra, 538 U.S. at 97, 123 S.Ct. at 1149, 155 L.Ed.2d at 180, necessarily depends on whether it falls closer on the scale to traditional forms of punishment, such as parole. The overall objective of SOMA is public safety, which we have observed is present in both punitive and civil remedial schemes.
>
> "In the end, we conclude that SOMA's adverse effects are 'so punitive ... as to negate the State's intent to deem it only civil and regulatory.' Id. at 92, 123 S.Ct. at 1147, 155 L.Ed.2d at 176 (alteration, citation, and internal quotation marks omitted); see Bowditch, supra, 700 S.E.2d at 21 (Hudson, J., dissenting) ('The physical and practical realities of the [GPS monitoring] program ... transform the effect of the scheme from regulatory to punitive.'). The retroactive application of SOMA to George Riley twenty-three years after he committed the sexual offense at issue and after he fully completed his criminal sentence violates the Ex Post Facto Clauses of the United States and New Jersey Constitutions."

Riley, 98 A.3d at 552-60, 219 N.J. at 284-97.

Based on the foregoing, we affirm L.M.L.'s convictions and sentences under Counts 4, 13, 15, 16, 17, and 18 of the indictment. We also affirm her convictions under Counts 5, 14, and 19 of the indictment. However, because § 13A-5-6(c) was not in effect when L.M.L. committed the offenses in Counts 5, 14, and 19, we must remand this cause for the trial court to set aside the periods of post-release supervision imposed for

L.M.L.'s convictions under those counts. Because the confinement portions of those sentences -- 99 years' imprisonment for each conviction -- are legal, they cannot be changed. See, e.g., Bishop, ___ So. 3d at ___, and the cases cited therein. Due return shall be filed with this Court within 28 days of the date of this opinion.

AFFIRMED IN PART; REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Kellum and McCool, JJ., concur. Minor, J., concurs in part and dissents in part, with opinion. Cole, J., concurs in part, concurs in the result in part, and dissents in part, with opinion.

MINOR, Judge, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion. I respectfully dissent from that part of the Court's opinion holding illegal the periods of post-release supervision the circuit court imposed on L.M.L.'s convictions for first-degree rape and first-degree sodomy of C.J. when C.J. was less than 12 years old (Counts 5 and 14) and for first-degree sodomy of S.L. when S.L. was less than 12 years old (Count 19). In holding that those periods of post-release supervision are illegal, the main opinion (1) wrongly holds that retroactive application of the post-release-supervision requirement in § 13A-5-6(c) violates the Ex Post Facto Clause of the United States Constitution[11] and (2) frustrates the legislature's efforts to protect children from dangerous sex offenders like L.M.L.

The main opinion accepts L.M.L.'s arguments about post-release supervision under § 13A-5-6(c).[12] The Court concludes that, based on

---

[11]Article I, § 9, cl. 3, of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."

[12]As the main opinion notes, the State agrees with L.M.L.'s argument that the circuit court lacked authority to impose the periods of post-release supervision if the acts were committed before the effective date of § 13A-5-6(c), Ala. Code 1975. That agreement between L.M.L.

Garner v. State, 977 So. 2d 533 (Ala. Crim. App. 2007), and S.R.A. v. State, 292 So. 3d 1108 (Ala. Crim. App. 2019), the post-release-supervision requirement in § 13A-5-6(c) cannot constitutionally apply to offenses like L.M.L.'s that were committed before the effective date of that code section.

Although a plurality of this Court determined in S.R.A., 292 So. 3d at 1113, that "the sentencing requirements of § 13A-5-6(c) do not apply

---

and the State, however, relies on an erroneous construction of § 13A-5-6(c) as prospective, not retroactive.

When this Court construes a statute, "[o]ur primary obligation is to 'ascertain and give effect to the intent of the Legislature as that intent is expressed through the language of the statute.' Ex parte Krothapalli, 762 So. 2d 836, 838 (Ala. 2000)." Simcala, Inc. v. American Coal Trade, Inc., 821 So. 2d 197, 200 (Ala. 2001).

> "As Justice Harwood noted in his special writing in City of Bessemer v. McClain, 957 So. 2d 1061, 1082 (Ala. 2006) (Harwood, J., concurring in part and dissenting in part): '[D]eference to the ordinary and plain meaning of the language of a statute is not merely a matter of an accommodating judicial philosophy; it is a response to the constitutional mandate of the doctrine of the separation of powers set out in Art. III, § 43, Alabama Constitution of 1901.'"

State v. $223,405.86, 203 So. 3d 816, 842 (Ala. 2016) (emphasis added). Thus, when construing a legislative enactment, we are not constrained by the parties' arguments.

to any offense committed before that date," this Court considered the argument only as S.R.A. presented it. This Court did not consider whether § 15-20A-20(d), Ala. Code 1975, part of the "Alabama Sex Offender Registration and Community Notification Act" ("ASORCNA"), applied the post-release-supervision requirement retroactively to S.R.A. Similarly, this Court in Garner, 977 So. 2d at 539 (Ala. Crim. App. 2007), did not consider whether the Community Notification Act ("CNA")—the predecessor to ASORCNA—retroactively applied the post-release-supervision requirement found in both the CNA and § 13A-5-6(c) to Garner. In both decisions, this Court should have considered the respective provisions of ASORCNA and the CNA. See, e.g., League of Women Voters v. Renfro, 292 Ala. 128, 131, 290 So. 2d 167, 169 (1974) ("Statutes are in pari materia where they deal with the same subject. Kelly v. State, 273 Ala. 240, 139 So. 2d 326. Where statutes are in pari materia they should be construed together to ascertain the meaning and intent of each. City of Birmingham v. Southern Express Co., [164 Ala. 529, 51 So. 159 (1909)]. Where possible, statutes should be resolved in favor of each other to form one harmonious plan and give uniformity to the law. Waters v. City of Birmingham, 282 Ala. 104, 209 So. 2d 388;

Walker County v. White, 248 Ala. 53, 26 So. 2d 253.").

Section 15-20A-20(d), Ala. Code 1975, provides:

> "Any person convicted of a Class A felony sex offense involving a child as defined in Section 15-20A-4, upon release from incarceration, shall be subject to electronic monitoring supervised by the Board of Pardons and Paroles, as provided in subsection (a), for a period of no less than 10 years from the date of the sex offender's release. This requirement shall be imposed by the sentencing court as a part of the sex offender's sentence in accordance with subsection (c) of Section 13A-5-6."

Section 13A-5-6(c) provides:

> "In addition to any penalties heretofore or hereafter provided by law, in all cases … where an offender is convicted of a Class A felony sex offense involving a child as defined in Section 15-20A-4, and is sentenced to a county jail or the Alabama Department of Corrections, the sentencing judge shall impose an additional penalty of not less than 10 years of post-release supervision to be served upon the defendant's release from incarceration."

This Court has recognized that § 13A-5-6(c) and § 15-20A-20(d) are intertwined. See Bishop v. State, [Ms. CR-19-0726, July 9, 2021] ___ So. 3d ___, ___ (Ala. Crim. App. 2021) ("It is clear, based on the legislature's specific reference in § 15-20A-20(d) to § 13A-5-6(c), that the post-release supervision referred to in § 13A-5-6(c) is electronic monitoring as found in § 15-20A-20(d).").

Although § 15-20A-20[13] was not in effect when L.M.L. committed the offenses, it was in effect when she was sentenced, and § 15-20A-3 makes the section retroactive: "This chapter is applicable to every adult sex offender convicted of a sex offense as defined in Section 15-20A-5, without regard to when his or her crime or crimes were committed or his or her duty to register arose." (Emphasis added.) First-degree rape of a child under the age of 12 and first-degree sodomy of a child under the age of 12 are both "Class A felony sex offense[s] involving a child as defined in § 15-20A-4." See § 13A-6-61(b), Ala. Code 1975 ("Rape in the first degree is a Class A felony."); § 13A-6-63(b), Ala. Code 1975 ("Sodomy in the first degree is a Class A felony."); § 15-20A-4(2), Ala. Code 1975 (defining a "child" as "[a] person who has not attained the age of 12"; § 15-20A-4(27), Ala. Code 1975 (defining "sex offense involving a child" as "[a] conviction for any sex offense in which the victim was a child or any offense involving child pornography"). Thus, although § 13A-5-6(c) was not in effect when L.M.L. committed the offenses, § 15-20A-20 authorized the circuit court to impose post-release supervision for L.M.L.'s

[13]Section 15-20-26.1, Ala. Code 1975, which the legislature repealed effective July 1, 2011, imposed a similar requirement for electronic monitoring.

convictions under Counts 5, 14, and 19.

The same act that enacted § 13A-5-6(c)—Act No. 2005-301, Ala. Acts 2005—also enacted § 15-20-26.1(d), Ala. Code 1975, the predecessor to current § 15-20A-20(d). Section 15-20-26.1(d) provided:

> "Any person convicted of a Class A felony criminal sex offense involving a child as defined in Section 15-20-21(5), upon release from incarceration, shall be subject to electronic monitoring supervised by the Board of Pardons and Paroles, as provided in subsection (a), for a period of no less than 10 years from the date of the offender's release. This requirement shall be imposed by the sentencing court as a part of the offender's sentence in accord with Section 13A-5-6(c)."

When the legislature enacted Act No. 2005-301, it did not do so in a vacuum. Act No. 2005-301 made § 15-20-26.1 part of Title 15, Article 20, and § 15-20-1 made Title 15, Article 20, retroactive. See § 15-20-1, Ala. Code 1975 ("This article shall apply to persons who have been arrested and convicted for any act of, or attempt to commit an act of, sexual perversion …." (emphasis added)).

In 2011, the legislature repealed Title 15, Article 20, and replaced it with ASORCNA. ASORCNA included both a post-release-supervision requirement (§ 15-20A-20) and a more robust retroactivity provision (§ 15-20A-3). As stated above, § 15-20A-3 makes Chapter 20A retroactive—including the post-release-supervision requirement in § 15-20A-20 (and,

by express reference, the post-release-supervision requirement of § 13A-5-6(c)).

The main opinion, however, concludes that doing what the legislature has instructed be done—apply the post-release-supervision requirement retroactively—would violate the Ex Post Facto Clause in Art. I, § 9, cl. 3, of the United States Constitution. But L.M.L. does not ask us to hold that, and no Alabama Court has so held.

Although L.M.L. has never expressly challenged the constitutionality of the post-release-supervision requirement—not in the trial court or in this Court—the main opinion makes constitutional objections for her. This Court does so based on decisions such as Magee v. Boyd, 175 So. 3d 79 (Ala. 2015), and State v. Giorgetti, 868 So. 2d 512 (Fla. 2004), which, the Court says, require it to construe statutes in a manner that avoids holding them unconstitutional.

In both Magee and Giorgetti, the parties—not the appellate court acting sua sponte—challenged the constitutionality of the statutes. And Magee involved a facial challenge to the statute at issue—i.e., the plaintiffs there argued that under no set of circumstances could the statute be constitutionally applied. In that context, the Alabama

Supreme Court stated this standard of review:

> "This Court's review of constitutional challenges to legislative enactments is de novo. Richards v. Izzi, 819 So. 2d 25, 29 n.3 (Ala. 2001). In McInnish v. Riley, 925 So. 2d at 178, this Court further stated:
>
> > "'[T]he standard of review of the trial court's judgment as to the constitutionality of legislation is well established. This Court "'should be very reluctant to hold any act unconstitutional.'" ... "[I]n passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government." Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944). This is so, because "it is the recognized duty of the court to sustain the act unless it is clear beyond a reasonable doubt that it is violative of the fundamental law." 246 Ala. at 9, 18 So. 2d at 815.'
>
> "(Emphasis omitted.)
>
> "'"'It is the duty of the court to construe a statute so as to make it harmonize with the constitution if this can be done without doing violence to the terms of the statute and the ordinary canons of construction.'"' Ex parte Jenkins, 723 So. 2d 649, 658 (Ala. 1998) (quoting Board of Educ. of Choctaw Cnty. v. Kennedy, 256 Ala. 478, 482, 55 So. 2d 511, 514 (1951), quoting in turn Almon v. Morgan Cnty., 245 Ala. 241, 246, 16 So. 2d 511, 516 (1944)).
>
> > "'Where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other would be valid, the courts should

> adopt the construction which would uphold it .... Or, as otherwise stated, it is the duty of the courts to adopt the construction of a statute to bring it into harmony with the constitution, if its language will permit.'
>
> "Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 10, 18 So. 2d 810, 815 (1944). '"'We will not invalidate a statute on constitutional grounds if by reasonable construction it can be given a field of operation within constitutionally imposed limitations.'"' Lunsford v. Jefferson Cnty., 973 So. 2d 327, 330 (Ala. 2007) (quoting Town of Vance v. City of Tuscaloosa, 661 So. 2d 739, 742-43 (Ala. 1995) (other citation omitted))."

Magee, 175 So. 3d at 106-07.

Not only has L.M.L. never challenged the constitutionality of the post-release-supervision requirement in § 13A-5-6(c), but she also waited until her appeal to make any challenge to the periods of post-release supervision imposed. This Court may address illegal sentences on appeal, but we rarely make constitutional objections for a party who has not made them for herself. See, e.g., Davis v. State, 689 So. 2d 225, 226 (Ala. Crim. App. 1996) ("We have consistently held that 'claims—even those raising constitutional issues—are waivable.' Puckett v. State, 680 So. 2d 980 (Ala. Cr. App. 1996)."). Thus, having concluded that the post-release-supervision requirement is retroactive, I would end the analysis and affirm the circuit court's judgment. The constitutionality of

retroactive application of the post-release-supervision requirement should wait for another day.

But because the main opinion addresses whether retroactive application of the post-release-supervision requirement violates the Ex Post Facto Clause, so will I. In Belleau v. Wall, 811 F.3d 929 (7th Cir. 2016), the United States Circuit Court of Appeals for the Seventh Circuit held that a similar post-release-supervision requirement did not violate the Ex Post Facto Clause.

In Belleau, the sex offender committed offenses in the 1980s and 1990s. In 2006, Wisconsin began requiring GPS monitoring for certain convicted sex offenders who were civilly committed. Once Belleau was released from civil commitment in 2010, he argued that Wisconsin's GPS-monitoring requirement violated the Fourth Amendment and the Ex Post Facto Clause. In rejecting his claim that the monitoring requirement violated the Ex Post Facto Clause, the Seventh Circuit reasoned:

> "A statute is an ex post facto law only if it imposes punishment. Smith v. Doe, [538 U.S. 84,] 92-96 [(2003)]. The monitoring law is not punishment; it is prevention. See, e.g., id. at 97-106, 123 S. Ct. 1140; Mueller v. Raemisch, 740 F.3d 1128, 1133-35 (7th Cir. 2014); Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007); cf. Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003); City of Indianapolis v. Edmond, 531 U.S. 32, 44-46, 121 S. Ct. 447,

148 L. Ed. 2d 333 (2000); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990); Skinner v. Railway Labor Executives' Ass'n, supra, 489 U.S. at 620-21, 630, 109 S. Ct. 1402. [Belleau] does not quarrel with his civil commitment; even though it took away his freedom and was in most respects indistinguishable from confining him in prison, it was not ex post facto punishment because the aim was not to enhance the sentences for his crimes but to prevent him from continuing to molest children. In Kansas v. Hendricks, 521 U.S. 346, 368-69, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), the Supreme Court held that civil commitment of sex offenders who have completed their prison sentences but are believed to have a psychiatric compulsion to repeat such offenses is not punishment as understood in the Constitution; it is prevention. The aim of the anklet monitor statute is the same, and the difference between having to wear the monitor and being civilly committed is that the former measure is less likely to be perceived as punishment than is being imprisoned in an asylum for the criminally insane. So if civil commitment is not punishment, as the Supreme Court has ruled, then a fortiori neither is having to wear an anklet monitor. It is not 'excessive with respect to [the nonpunitive] purpose,' Smith v. Doe, supra, 538 U.S. at 97, 123 S. Ct. 1140, for Wisconsin to conclude that all formerly committed sex offenders pose too great a risk to the public to be released without monitoring.

"Having to wear the monitor is a bother, an inconvenience, an annoyance, but no more is punishment than being stopped by a police officer on the highway and asked to show your driver's license is punishment, or being placed on a sex offender registry, held by the Supreme Court in Smith v. Doe, supra, and by our court in Mueller v. Raemisch, supra, 740 F.3d at 1133, not to be punishment. But while citing Smith v. Doe the district judge in this case did not properly apply that decision, but instead embraced the hyperbolic statement in Riley v. New Jersey State Parole Bd., 219 N.J. 270, 98 A.3d 544, 559 (2014), that 'the tracking device

> attached to Riley's ankle identifies Riley as a sex offender no less clearly than if he wore a scarlet letter.' No, the aim of requiring a person who has psychiatric compulsion to abuse children sexually to wear a GPS monitor is not to shame him, but to discourage him from yielding to his sexual compulsion, by increasing the likelihood that if he does he'll be arrested because the Department of Corrections will have incontestable evidence that he was at the place where and at the time when a sexual offense was reported to have occurred.
>
> "To return to our traffic analogy briefly: no one thinks that a posted speed limit is a form of punishment. It is a punishment trigger if the police catch you violating the speed limit, but police are not required to obtain a warrant before stopping a speeding car. The anklet monitor law is the same: it tells [Belleau]—if you commit another sex offense, you'll be caught and punished, because we know exactly where you are at every minute of every day. Similar statutes in other states have reduced sex-crime recidivism. And though no one doubts the propriety of parole supervision of sex criminals though it diminishes parolees' privacy, a study by the National Institute of Justice finds that GPS monitoring of sex criminals has a greater effect in reducing recidivism than traditional parole supervision does. [Stephen V. Gies, et al., 'Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of the California Supervision Program,' Final Report, pp.] vii, 3-11, 3-13 [(March 2012)]."

811 F.3d at 937-38 (emphasis added).

I find the Seventh Circuit's reasoning, like the reasoning this Court used in rejecting ex post facto challenges to the CNA, see, e.g., Crawford v. State, 92 So. 3d 168 (Ala. Crim. App. 2011), and Lee v. State, 895 So. 2d 1038 (Ala. Crim. App. 2004), persuasive. In § 15-20A-2(5), Ala. Code

1975, the legislature stated that "its intent in imposing certain registration, notification, monitoring, and tracking requirements on sex offenders is not to punish sex offenders but to protect the public and, most importantly, promote child safety." (Emphasis added.) "Because we 'ordinarily defer to the legislature's stated intent,' [Kansas v.] Hendricks, [521 U.S. 346,] 361, 117 S. Ct. 2072, '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' Hudson v. United States, 522 U.S. 93, 100, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) (quoting [United States v.] Ward, [448 U.S. 242,] 249, 100 S. Ct. 2636 [(1980)]) …." Smith v. Doe, 538 U.S. 84, 92 (2003).

The legislature's labeling of the supervision as "an additional penalty" in § 13A-5-6(c) is not dispositive.[14] See Lee, 895 So. 2d at 1041-42. Nor does the legislature's inclusion of the requirement in the Criminal Code mean that it is punishment for purposes of the Ex Post Facto Clause. Id. at 1042. See also Smith, 538 U.S. at 94 ("The location and labels of a statutory provision do not by themselves transform a civil

[14]The legislature did not label the measure a "penalty" in § 15-20A-20(d).

remedy into a criminal one. … '[B]oth criminal and civil sanctions may be labeled "penalties."'" (citations omitted)). Rather, the crux of the Ex Post Facto analysis is "whether the statute is so punitive in effect as to negate the legislature's intent." Lee, 895 So. 2d at 1042-43. For the reasons the Seventh Circuit stated in Belleau, the requirement that a dangerous sex offender like L.M.L. be electronically monitored for at least 10 years after her release "is not punishment; it is prevention." 811 F.3d at 937. Thus, the post-release-supervision requirement in § 15-20A-20 and § 13A-5-6(c) does not violate the Ex Post Facto Clause.

The main opinion distinguishes Belleau as involving electronic monitoring of a sex offender who had been civilly committed. But under the facts of Belleau, that distinction made no difference. Belleau's civil commitment had ended based on "the opinion of a psychologist that he was no longer more likely than not to commit further sexual assaults." 811 F.3d at 931. Upon his release from civil commitment, the State of Wisconsin required him to wear a GPS monitoring device 24 hours a day for the rest of his life.

In his claims against officials of the Wisconsin Department of Corrections who administered the monitoring statute, Belleau argued

> "that the statute violates both the Fourth Amendment to the Constitution and Article I, § 10, cl. 1 of the Constitution, the latter being the prohibition of states' enacting ex post facto laws—laws that either punish people for conduct made criminal only after they engaged in it or increase the punishment above the maximum authorized for their crime when they committed it."

811 F.3d at 931. The Seventh Circuit rejected both challenges. The Court noted that, "[a]lthough the [district] judge wrote a long opinion" holding the monitoring statute unconstitutional, that opinion had "omit[ted] what seem to us the crucial considerations in favor of the constitutionality of Wisconsin's requiring [Belleau] to wear the ankle bracelet for the rest of his life." Id. The Court stated:

> "Anyone who drives a car is familiar with GPS technology, which enables the driver to determine his geographical location, usually within a few meters. The GPS ankle bracelet (more commonly referred to as an ankle monitor or anklet monitor; we'll use the latter term) … likewise determines the geographical location of the person wearing it, within an error range of no more than 30 meters. The most common use of such monitors is to keep track of persons on probation or parole; the device that Wisconsin uses is advertised specifically for those purposes. But such devices are also used by some parents to keep track of their kids or elderly relatives and by some hikers and mountain climbers to make sure they know where they are at all times or to track their speed.
>
> "The type of anklet worn by [Belleau] is waterproof to a depth of fifteen feet, so one can bathe or shower while wearing it. It must however be plugged into a wall outlet for an hour

each day (while being worn) in order to recharge it. There are no restrictions on where the person wearing the anklet can travel, as long as he has access to an electrical outlet. Should he move away from Wisconsin, he ceases having to wear it. And while he's supposed to pay a monthly fee to compensate for the cost of the anklet, [Belleau] does not pay it and the Department of Corrections appears not to have tried to compel him to do so.

"When the ankleted person is wearing trousers the anklet is visible only if he sits down and his trousers hike up several inches and as a result no longer cover it. [Belleau] complains that when this happens in the presence of other people and they spot the anklet, his privacy is invaded, in violation of the Fourth Amendment, because the viewers assume that he is a criminal and decide to shun him. Of course the Fourth Amendment does not mention privacy or create any right of privacy. It requires that searches be reasonable but does not require a warrant or other formality designed to balance investigative need against a desire for privacy; the only reference to warrants is a prohibition of general warrants. And although the Supreme Court has read into the amendment a qualified protection against invasions of privacy, its recent decision in Grady v. North Carolina, 575 U.S. 306, 135 S. Ct. 1368, 1371, 191 L. Ed. 2d 459 (2015) (per curiam), indicates that electronic monitoring of sex offenders is permitted if reasonable, cf. Samson v. California, 547 U.S. 843, 848–50, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006); Vernonia School District 47J v. Acton, 515 U.S. 646, 652-53, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 618-24, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)—and that standard is satisfied in this case.

"Having to wear a GPS anklet monitor is less restrictive, and less invasive of privacy, than being in jail or prison, or for that matter civilly committed, which realistically is a form of imprisonment. [Belleau] argues that because he is not on bail,

parole, probation, or supervised release, and so is free of the usual restrictions on the freedom of a person accused or convicted of a crime, there is no lawful basis for requiring him to wear the anklet monitor. But this misses two points. The first is the nature of the crimes he committed—sexual molestation of prepubescent children. In other words [Belleau] is a pedophile, which, as the psychologist who evaluated him explained, 'predisposes [Belleau] to commit sexually violent acts.... [I]t is well understood in my profession that pedophilia in adults cannot be changed, and I concluded that Mr. Belleau had not shown that he could suppress or manage his deviant desire.' The compulsive nature of such criminal activity is recognized in Rules 414 and 415 of the Federal Rules of Evidence, which in contrast to the rules governing cases involving other crimes allow evidence of the defendant's other crimes, or acts, of sexual molestation of children to be introduced in evidence in a criminal or civil case in which the defendant is accused of such molestation.

"[Belleau] is about to turn 73, however, and he argues that he has 'aged out' of pedophilic acts. There is evidence that the arrest rate of pedophiles declines with age, and from this it can be inferred that pedophilic acts probably decline with age as well, though there are no reliable statistics on the acts, as distinct from the arrests for engaging in the acts. There is no reason to think that the acts decline to zero. Most men continue to be sexually active into their 70s, and many remain so in their 80s and even 90s. Stacy Tessler Lindau et al., 'A Study of Sexuality and Health among Older Adults in the United States,' 357 New England J. Medicine 762-74 (Aug. 23, 2007). And even if not physically capable of the common forms of male sexual activity, older men can still molest and grope young children.

"The psychologist who recommended that [Belleau] be released from civil commitment opined that the risk of [Belleau] being charged or convicted of further sex crimes against young children had been 16 percent when he was

released from civil commitment and could be expected to be about 8 percent at the time of the district judge's summary judgment order this past September. It is important to understand however that such estimates, based on personal characteristics, such as age, number of past convictions, and type of victim, pertain only to the odds that the released offender will subsequently be arrested for or convicted of—in short, detected—committing further sex crimes. Gregory DeClue & Denis L. Zavodny, 'Forensic Use of the Static–99R: Part 4. Risk Communication,' 1 Journal of Threat Assessment & Management 145, 149 (2014). In the words of the psychologist, 'actuarial scales ... underestimate the risk an offender will commit an offense over [his] lifetime.'

"There is serious underreporting of sex crimes, especially sex crimes against children. A nationwide study based on interviews with children and their caretakers found that 70 percent of child sexual assaults reported in the interviews had not been reported to police. David Finkelhor, Heather Hammer, & Andrea J. Sedlak, 'Sexually Assaulted Children: National Estimates & Characteristics,' Juvenile Justice Bulletin 8 (August 2008). The true level of underreporting must be even higher, because the study did not account for sexual assaults that go unreported in the interviews. Another study finds that 86 percent of sex crimes against adolescents go unreported to police or any other authority, such as a child protective service. U.S. Dept. of Justice, Office of Justice Programs, 'Youth Victimization: Prevalence and Implications' 6 (April 2003); see also Candace Kruttschnitt, William D. Kalsbeek & Carol C. House (eds.), National Research Council, Estimating the Incidence of Rape and Sexual Assault 36-38 (2014).

"And even if we credit the 8 and 16 percent figures [Belleau] can't be thought just a harmless old guy. Readers of this opinion who are parents of young children should ask themselves whether they should worry that there are people in their community who have 'only' a 16 percent or an 8

percent probability of molesting young children—bearing in mind the lifelong psychological scars that such molestation frequently inflicts. See, e.g., Christina Rainville, 'Using Undiagnosed Post–Traumatic Stress Disorder to Prove Your Case: A Child's Story,' 31 Child Law Practice 97 (2012); Beth E. Molnar, Stephen L. Buka & Ronald C. Kessler, 'Child Sexual Abuse and Subsequent Psychopathology: Results from the National Comorbidity Survey,' 91 American J. Public Health 753 (2001). The Supreme Court in Smith v. Doe, 538 U.S. 84, 103, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), remarked on 'the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." McKune v. Lile, 536 U.S. 24, 34, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002); see also id. at 33, 122 S. Ct. 2017 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))).'

"Of child molesters released from prison in 1994, 39 percent were rearrested (though not necessarily for child molestation) within three years. U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994, p. 17, tab. 10 (Nov. 2003). Although non-sex offenders had a higher rearrest rate (68 percent) than sex offenders and only 3 percent of child molesters were rearrested for a child-molestation offense, id. at 14, 17, these numbers don't take account of the very high rate of underreporting of sex offenses. If only 20 percent of child molestations result in an arrest, the 3 percent recidivism figure implies that as many as 15 percent of child molesters released from prison molest again. That's a high rate when one considers the heavy punishment they face if caught

recidivating, and thus is further evidence of the compulsive nature of their criminal activity.

"In short, [Belleau] cannot be certified as harmless merely because he no longer is under any of the more familiar kinds of post-imprisonment restriction. As for his civil commitment having been terminated on the basis of a psychologist's determination that he was not more likely than not to molest children any longer, we doubt that the community would or should be reassured by a psychologist's guess that a pedophile has 'only' (say) a 49 percent chance of reoffending, or even the 16 percent chance estimated in this case—especially given all the accompanying negatives in the psychologist's report. His affidavit states that [Belleau] is a pedophile and that 'pedophilia in adults cannot be changed, and ... [Belleau] had not shown that he could suppress or manage his deviant arousal,' 'had not reduced his sexual deviance and had not shown that he could suppress or manage his deviant arousal,' 'had a mental disorder that predisposed him to commit sexually violent acts,' and 'was not eligible for supervised release because he had not made significant progress in treatment.' There is the further problem that the 16 percent figure is just a guess, and the even more serious problem that the figure implies that of every six pedophiles with characteristics similar to those of [Belleau] in this case one will resume molesting children after his release from prison. Assuming that the anklet would (for reasons we'll explain) deter that person, requiring that it be worn is a nontrivial protection for potential victims of child molestation.

"The focus must moreover be on the incremental effect of the challenged statute on [Belleau's] privacy, and that effect is slight given the decision by Wisconsin—which he does not challenge—to make sex offenders' criminal records and home addresses public. These records are downloaded by private websites such as Family Watchdog that enable anyone with access to the Internet to determine whether a sex

offender—more precisely anyone who has ever been convicted of a sexual offense serious enough to be made public by the state—lives near him. One of the members of this appellate panel, out of curiosity stimulated by another sex offender privacy case, visited Family Watchdog and learned that there were several (one hopes reformed—but it is only a hope) sex offenders living on his street.

"So [Belleau's] privacy has already been severely curtailed as a result of his criminal activities, and he makes no challenge to that loss of privacy. The additional loss from the fact that occasionally his trouser leg hitches up and reveals an anklet monitor that may cause someone who spots it to guess that this is a person who has committed a sex crime must be slight.

"For it's not as if the Department of Corrections were following [Belleau] around, peeking through his bedroom window, trailing him as he walks to the drug store or the local Starbucks, videotaping his every move, and through such snooping learning (as the amicus curiae brief of the Electronic Frontier Foundation would have it) 'whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband,' etc. (quoting United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010)). The fruits of such surveillance techniques would be infringements of privacy that the Supreme Court deems serious. See, e.g., Kyllo v. United States, 533 U.S. 27, 33-36, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); see also Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring); United States v. Jones, 565 U.S. 400, 132 S. Ct. 945, 954-56, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring); id. at 963-64 (Alito, J., concurring). But nothing of that kind is involved in this case, quite apart from the fact that persons who have demonstrated a compulsion to commit very serious crimes and have been civilly determined to have a more likely than not chance of reoffending must expect to have a diminished right of privacy

as a result of the risk of their recidivating—and as Justice Harlan explained in his influential concurrence in the Katz case, the only expectation of privacy that the law is required to honor is an 'expectation ... that society is prepared to recognize as "reasonable."' 389 U.S. at 361, 88 S. Ct. 507.

"Rather, every night the Department of Corrections makes a map of every anklet wearer's whereabouts that day so that should he be present at a place where a sex crime has been committed, or be hanging around school playgrounds or otherwise showing an abnormal interest in children not his own, the police will be alerted to the need to conduct an investigation. But the main 'objective of the searches [the mapping, in this case] was [not] to generate evidence for law enforcement purposes,' as in Ferguson v. City of Charleston, 532 U.S. 67, 83, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (emphasis in original), but instead to deter future offenses by making [Belleau] aware that he is being monitored and is likely therefore to be apprehended should a sex crime be reported at a time, and a location, at which he is present.

"[Belleau's] argument that his monitoring violates the Fourth Amendment is further weakened when we consider the concession by his lawyer at oral argument that the Wisconsin legislature could, without violating the Fourth Amendment, make lifetime wearing of the anklet monitor a mandatory condition of supervised release for anyone convicted of sexual molestation of a child. That would be a likely, and seemingly an unassailable, response of the legislature to a decision by this court upholding the district court's invalidation of the GPS-monitoring statute—which is to say that for pedophiles to prevail in cases such as this would give them only a hollow victory.

"It's untrue that 'the GPS device burdens liberty ... by its continuous surveillance of the offender's activities,' Commonwealth v. Cory, 454 Mass. 559, 911 N.E.2d 187, 196–97 (2009); it just identifies locations; it doesn't reveal

what the wearer of the device is doing at any of the locations. And its 'burden' must in any event be balanced against the gain to society from requiring that the anklet monitor be worn. It is because of the need for such balancing that persons convicted of crimes, especially very serious crimes such as sexual offenses against minors, and especially very serious crimes that have high rates of recidivism such as sex crimes, have a diminished reasonable constitutionally protected expectation of privacy.

"So let's recapitulate the gain to society from GPS monitoring of convicted sexual molesters. Every night as we said a unit of the Department of Corrections downloads the information collected that day by the anklet monitor and creates a map showing all the locations at which the wearer was present during the day and what time he was present at each location. Should a sexual offense be reported at a location and time at which the map shows the person wearing the anklet to have been present, he becomes a suspect and a proper target of investigation. But by the same token if he was not at the scene of the crime when the crime was committed, the anklet gives him an ironclad alibi. Missing this point, the amicus curiae brief of the Electronic Frontier Foundation in support of [Belleau] criticizes anklet monitoring for its accuracy!

"A study of similar GPS monitoring of parolees in California found that they were half as likely as traditional parolees to be arrested for or convicted of a new sex offense. Stephen V. Gies, et al., 'Monitoring High–Risk Sex Offenders with GPS Technology: An Evaluation of the California Supervision Program,' Final Report, pp. 3-11, 3-13 (March 2012). There is no reason to think that GPS monitoring of convicted child molesters in Wisconsin is any less efficacious.

"Given how slight is the incremental loss of privacy from having to wear the anklet monitor, and how valuable to society (including sex offenders who have gone straight) the

information collected by the monitor is, we can't agree with the district judge that the Wisconsin law violates the Fourth Amendment. [Belleau] argues that monitoring a person's movements requires a search warrant. That's absurd. The test is reasonableness, not satisfying a magistrate. Consider a neighborhood in which illegal drug dealing is common. There will be an enhanced police presence in the neighborhood and, probably more important, several former or present drug dealers whom the police have enlisted as undercover agents. The result will be surveillance of the drug scene. No one (unless it's [Belleau's] lawyer in this case) thinks that such surveillance requires a warrant.

"Or suppose police place hidden cameras in traffic lights to detect drivers who run red lights. That is investigative surveillance similar to what the Wisconsin Department of Corrections is doing with regard to potential sex offenders, yet no warrant is required for traffic surveillance. It would be odd to think that the Department of Corrections could not use GPS monitoring to determine [Belleau's] location at all times, but could have one of its agents follow him whenever he left his house.

"It would be particularly odd to think that all searches require a warrant just because most of them invade privacy to a greater or lesser extent. The terms of supervised release, probation, and parole often authorize searches by probation officers without the officers' having to obtain warrants, and the Supreme Court has held that such warrantless searches do not violate the Fourth Amendment as long as they are reasonable. Samson v. California, supra; United States v. Knights, 534 U.S. 112, 118-120, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001). The 'search' conducted in this case via the anklet monitor is less intrusive than a conventional search. Such monitoring of sex offenders is permissible if it satisfies the reasonableness test applied in parolee and special-needs cases. Grady v. North Carolina, supra, 135 S. Ct. at 1371. Wisconsin's ankle monitoring of Belleau is reasonable."

Belleau, 811 F.3d at 931-37 (some emphasis added).

I recognize that much of the above-quoted portion of Belleau occurs in the context of addressing Belleau's challenge under the Fourth Amendment. But the Court relied on that factual background and discussion to reach its conclusion that the monitoring law also did not violate the Ex Post Facto Clause.

Here, unlike the developed record in Belleau, we have no evidence showing what the electronic monitoring of L.M.L. would involve. Yet the main opinion confidently asserts that any electronic monitoring would violate the Ex Post Facto Clause. It reaches that conclusion based on Riley v. New Jersey State Parole Board, 98 A. 3d 544, 219 N.J. 270 (2014), which, it says, is "thorough and well reasoned" and "more persuasive." ___ So. 3d at ___.

If we had a developed record and a properly raised constitutional challenge, maybe I would also find Riley more persuasive. Perhaps there is no way that the State of Alabama could retroactively require electronic monitoring of dangerous sex offenders like L.M.L. without violating the Ex Post Facto Clause. But Belleau suggests otherwise.

As the Alabama Supreme Court reiterated in Magee:

> "'Where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other would be valid, the courts should adopt the construction which would uphold it .... Or, as otherwise stated, it is the duty of the courts to adopt the construction of a statute to bring it into harmony with the constitution, if its language will permit.'
>
> "Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 10, 18 So. 2d 810, 815 (1944). '"'We will not invalidate a statute on constitutional grounds if by reasonable construction it can be given a field of operation within constitutionally imposed limitations.'"' Lunsford v. Jefferson Cnty., 973 So. 2d 327, 330 (Ala. 2007) (quoting Town of Vance v. City of Tuscaloosa, 661 So. 2d 739, 742-43 (Ala. 1995) (other citation omitted))."

Magee, 175 So. 3d at 106-07 (emphasis added).

The Court's decision today dismantles a crucial provision of ASORCNA—one that a developed record with statistical analysis with evidence like that in Belleau might show is the most practically protective provision of ASORCNA. Like its recent split decision in Bishop v. State, ___ So. 3d ___ (Ala. Crim. App. 2021),[15] this Court's decision

[15]The petitioner in Bishop committed the offenses after the effective date of § 13A-5-6(c), but, because the sentencing court had not specifically imposed post-release supervision under that subsection, the petitioner argued in a Rule 32, Ala. R. Crim. P., postconviction petition that his sentence was illegal. In my separate writing, I argued (1) that Rule 32 did not exist so that a petitioner could seek more supervision and (2) that

limits the legislature's efforts to protect children from dangerous sex offenders like L.M.L. As I stated in my separate writing in Bishop:

> "Through their elected representatives, the people of Alabama have adopted strict provisions for sentencing sex offenders. Those provisions are stricter for sex offenders like [L.M.L.] who have been convicted of crimes against children. In § 15-20A-2(5), Ala. Code 1975, the legislature found:
>
> > "'Sex offenders, due to the nature of their offenses, have a reduced expectation of privacy. In balancing the sex offender's rights, and the interest of public safety, the Legislature finds that releasing certain information to the public furthers the primary governmental interest of protecting vulnerable populations, particularly children. Employment and residence restrictions, together with monitoring and tracking, also further that interest. The Legislature declares

---

any error in the sentencing court's order was harmless because, even if the circuit court did not impose a period of post-release supervision for those offenders with convictions subject to the post-release-supervision requirement in § 13A-5-6(c), ASORCNA requires the Board of Pardons and Paroles to monitor those offenders electronically for at least 10 years. Bishop, ___ So. 3d at ___ (Minor, J., concurring in part and dissenting in part) ("It is not unreasonable that the legislature, to promote the stated purposes of ASORCNA, would include, along with imposing a duty on the Board, an extra provision requiring the circuit court to impose electronic monitoring of at least 10 years for sex offenders like Bishop. But based on the language of § 15-20A-20(d) and the statutory scheme as a whole, it makes sense to read § 15-20A-20(d) as imposing an independent duty on the Board to require electronic monitoring for at least 10 years even if the sentencing court fails to impose such a requirement."). Although this Court did not directly address the first argument, it rejected the second.

I continue to think Bishop was wrongly decided.

> that its intent in imposing certain registration, notification, monitoring, and tracking requirements on sex offenders is not to punish sex offenders but to protect the public and, most importantly, promote child safety.'

"(Emphasis added.) The legislature, no doubt to show its stated commitment to protecting the public and to promoting child safety, made the provisions of Title 15, Chapter 20A, retroactive. See § 15-20A-3(a), Ala. Code 1975 ('This chapter is applicable to every adult sex offender convicted of a sex offense as defined in Section 15-20A-5, [Ala. Code 1975,] without regard to when his or her crime or crimes were committed or his or her duty to register arose.'). That chapter includes the provisions for [post-release supervision by] electronic monitoring.

"….

"The Court's [decision], however, means that the Board need not electronically monitor a sex offender like [L.M.L.], who committed [her] offenses before the effective date of [§ 13A-5-6(c), Ala. Code 1975], because the sentencing court has no jurisdiction to impose electronic-monitoring requirements. Thus, under the Court's [decision], the Board [may not] monitor the most serious kinds of sex offenders—those who have committed crimes against children—if those offenders [committed their offenses before the effective date of § 13A-5-6(c)], Ala. Code 1975.

"Besides undermining the legislature's stated commitment to protecting the public and promoting child safety, the Court's decision today renders § 15-20A-20(d) prospective, not retroactive, and thus contradicts § 15-20A-3, Ala. Code 1975. The Court's decision thus leaves the door open for the most serious sex offenders—those who committed crimes against children—to escape electronic monitoring if they committed their offenses before the effective date of [§

> 13A-5-6(c), Ala. Code 1975]. This result is absurd, and it frustrates the legislature's stated goal of protecting the public from sex offenders like [L.M.L.] Cf. City of Bessemer, 957 So. 2d [1061,] at 1075 [(Ala. 2006)] ('If a literal construction would produce an absurd and unjust result that is clearly inconsistent with the purpose and policy of the statute, such a construction is to be avoided. Ex parte Meeks, 682 So. 2d 423 (Ala. 1996).')."

___ So. 3d at ___ (footnotes omitted).

For these reasons, I respectfully dissent from the Court's decision to hold illegal the periods of post-release supervision the circuit court imposed on L.M.L.'s convictions under Counts 5, 14, and 19. I urge the State of Alabama to seek certiorari review of this Court's decision.

COLE, Judge, concurring in part, concurring the result in part, and dissenting, in part.

I concur in Part II of this Court's opinion, and I concur in the result in Part I of this Court's opinion. As to Part III, however, I dissent and join Judge Minor's writing as to that part of this Court's opinion.